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Supreme Court of the United States

October Term, 1941

No. 745

THE SCHENECTADY UNION PUBLISHING COMPANY

Petitioner

against

MARTIN L. SWEENEY

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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against

MARTIN L. SWEENEY.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable the Chief Justice of the United States and the Associate Justices of the Supreme Court of the United States:

The Schenectady Union Publishing Company, defendant below, respectfully prays that a writ of certiorari issue to review the judgment of the Circuit Court of Appeals herein (R. 59), rendered by a divided court, which reversed a judgment of the District Court for the Northern District of New York finally dismissing a complaint in libel on the ground that it failed to state a cause of action against petitioner (R. 30-31).

Jurisdiction

The jurisdiction of this Court is invoked under Section 240(a) of the Judicial Code (28 U. S. C., § 347 (a)). The decision of the Circuit Court of Appeals was rendered on

July 18, 1941 (R. 33); rehearing was denied on August 15, 1941 (R. 58).

Opinions of the Courts Below

The District Court, in holding that the complaint did not state a cause of action against the petitioner, wrote an opinion which is not officially reported but appears at R. 18. The prevailing opinion in the Circuit Court of Appeals, by Judge CHASE, and the dissenting opinion, by Judge CLARK, are reported in 122 F. (2d) 288 (R. 33-39). Judge CLARK likewise noted his dissent from the memorandum denial of the petition for rehearing (R. 58).

We shall also refer to opinions written by various State and Federal courts in other actions commenced by respondent based on the same or substantially the same publication.

Summary Statement of the Matters Involved

THE COMPLAINT

Respondent, Congressman Martin L. Sweeney, on December 13, 1939 instituted this action in the District Court for the Northern District of New York against petitioner, the publisher of the *Schenectady Union Star*, basing jurisdiction on diversity of citizenship and the existence of the requisite amount in controversy (R. 2).

The complaint is grounded upon the claim that the publication involved is libelous *per se*, since special damages are not alleged.

Respondent alleges in substance that he is a citizen of Ohio and that petitioner is a corporation organized under the laws of New York (R. 2); that respondent is a member of Congress from the State of Ohio (R. 3);* and

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* The complaint also makes reference to the fact that respondent is a lawyer, but both the District Court and the Circuit Court of Appeals exclude the claim that respondent was libeled in his profession as a lawyer since the publication does not refer to him in that capacity. Both opinions properly cite *Keene* v. *Tribune Assn.*, 76 Hun (N. Y.) 488, in support of this proposition (R. 25, 35).

that petitioner, "intending to • • • deprive [respondent] of the respect, confidence and esteem peculiarly essential to his • • • office," and "to hold [him] up to public scorn, contempt, ridicule and disgrace" (*id.*), on December 23, 1938 falsely published of respondent, under the title "Washington Daily Merry-Go-Round," the following matter (R. 4):

> "(A hot behind-the-scenes fight is raging in Democratic congressional ranks over the effort of Father Coughlin to prevent the appointment of a Jewish judge in Cleveland.)
>
> "The proposed appointee is Emerich Burt Freed, U. S. District Attorney in Cleveland and former law partner of Senator Bulkley, who is on the verge of being elevated to the U. S. District Court.
>
> "[This has aroused the violent opposition of Representative Martin L. Sweeney, Democrat of Cleveland, known as the chief congressional spokesman of Father Coughlin.]
>
> "(Basis of the Sweeney-Coughlin opposition is the fact that Freed is a Jew, and one not born in the United States.) Born in Hungary in 1897, Freed was brought to the United States at the age of 13, was naturalized 10 years later.
>
> "[Irate, Representative Sweeney is endeavoring to call a caucus of Ohio Representatives December 28 to protest against Freed's appointment.]"

By bill of particulars subsequently furnished, respondent set forth the whole of the column published by petitioner under the "by-line" of Drew Pearson and Robert Allen of which the above-quoted material formed a part (R. 13-15), and he also specified the sentences of the quoted material which he claimed to be untrue. The sentences enclosed in brackets were claimed to be untrue; the sentences enclosed in parentheses were claimed to be untrue only so far as respondent was concerned; and as to the rest, respondent disclaimed knowledge or information sufficient to form a belief of truth or falsity (see R. 16).

The gravamen of the complaint is stated thus, in the form of an innuendo (R. 4):

> "The foregoing was meant and intended to convey that plaintiff was and is guilty of un-American, racial prejudice against persons of Jewish origin and guilty of conduct unbecoming a public officer and to hold plaintiff in contempt in the eyes of his constituents * * *"

No items of special damage are alleged; the complaint merely concludes with a general claim of damages in the sum of $250,000 (R. 5).

Petitioner's Motion

Petitioner, after filing an answer containing denials and affirmative defenses (R. 5-12), on September 21, 1940 moved for judgment on the pleadings dismissing the complaint on the ground that it failed to state a cause of action (R. 17).

District Court Ruling and Opinion

The District Court by order dated January 13, 1941 granted petitioner's motion, allowing respondent twenty days to amend (R. 29).

In its opinion granting the motion, the court stated that "the alleged libelous article does not say, nor does it necessarily carry the inference, that plaintiff is prejudiced against and intolerant of Jews as such," since opposition to the nomination of Freed as Ohio District Judge on the ground that he was a Jew might well have been motivated by purely political considerations having no relation to bias or prejudice against Jews (R. 20, 26-28). But apparently content to consider *arguendo* that the publication might be construed as charging respondent with anti-Semitic beliefs, the court entered upon a discussion of the pertinent decisional law of New York on libel, recognizing

its duty to apply the law of New York solely (*Erie Railroad Co.* v. *Tompkins*, 304 U. S. 64; R. 20).

While acknowledging that authorities cited by respondent contain formulary definitions of libel *per se*, as a general classification of the law of defamation, in terms of tendency "to expose the plaintiff to public contempt, ridicule, aversion or disgrace," etc. (R. 20), the court found that a special rule obtained in respect to writings concerning public officials, namely, that no accusation short of corruption or misconduct or impropriety in office can be libelous *per se*. To this effect authority in the Court of Appeals and the Appellate Divisions was cited (R. 21, 23-24). The court adverted to the place of such a rule in a country where freedom of speech and press is guaranteed (R. 24). Upon such analysis the court held the publication at bar to be not libelous *per se* and granted the motion to dismiss, but, recognizing that a false statement, although not libelous *per se*, remains actionable in New York if specific items of damage are pleaded and proved,* the court granted respondent leave to amend (R. 29). On respondent's failure to amend, the court entered final judgment in petitioner's favor (R. 30).

Majority Opinion in Circuit Court of Appeals

The majority opinion in the Circuit Court of Appeals, by Judge Chase, reversing the District Court and ruling that the publication is libelous *per se*, holds—contrary to the District Court, which merely assumed it *arguendo*—that the language of the article imputes anti-Semitic prejudice to respondent (R. 35).

In the body of his opinion Judge Chase cites only three New York cases.

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* *Al Raschid* v. *News Syndicate Co.*, 265 N. Y. 1, 4; *O'Connell* v. *Press Pub. Co.*, 214 N. Y. 352; *Husted* v. *Husted Co.*, 193 App. Div. 493.

He quotes from *Kimmerle* v. *New York Evening Journal, Inc.*, 262 N. Y. 99, 102, the formulary definition of words libelous *per se* as those which tend "to expose one to public hatred, shame, obloquy, contumely, odium, contempt, ridicule, aversion, ostracism, degradation, or disgrace or to induce an evil opinion of one in the minds of right-thinking persons, and to deprive one of their confidence and friendly intercourse in society"; and he says that *Sydney* v. *MacFadden Newspaper Pub. Corp.*, 242 N. Y. 208, is to the same effect.

Conceding that "It is, of course, not easy to apply the general test to a case of this nature," and that "Opinions or prejudices concerning the matter in hand might well lead to different conclusions" (R. 36), Judge CHASE proceeds to apply the formulary definition to the case in hand. He does not recognize any special rule as to public officials, and fails to cite the bulk of cases upon which the District Court rested enunciating that special rule. The only public official case cited by Judge CHASE is *Bennet* v. *Commercial Advertiser Assn.*, 230 N. Y. 125, and of this he says that "when made of a public official, false accusations which may well lead right-thinking people to believe him unworthy of public trust and confidence are libelous *per se*" (R. 36). (In fact the Court of Appeals in the *Bennet* case used quite different language,* and both the language and the facts of that case support the public official rule as above stated.)

The rest of the Judge's opinion is devoted to stating what appears to be the Judge's own view of the policy considerations involved without reference to the declarations of policy contained in New York cases.

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* The words just quoted from Judge CHASE's opinion are seemingly taken from the last paragraph of the *Bennet* opinion, but the precise language used by the Court of Appeals was "unworthy of public trust *and* a *betrayer* of civic confidence" (p. 132; italics ours).

DISSENTING OPINION IN CIRCUIT COURT OF APPEALS

In dissenting, Judge CLARK makes the following points:

1. The decision of the majority seems to him "not in accordance with New York law" (R. 37).

Judge CLARK rests upon the *Bennet* case in the Court of Appeals and the decisions of the Appellate Divisions in *Tanzer* v. *Crowley Pub. Corp.*, 240 App. Div. 203, *Gardner* v. *Home Life Pub., Inc.*, 237 App. Div. 200, and *Hills* v. *Press Co.*, 122 Misc. 212, *aff'd*, 214 App. Div. 752, in support of the special New York rule applicable to public officials (R. 37-38).

2. This view of the law seems general, as shown by the prevailing results in the seventy-five actions (R. 47) brought by respondent in other jurisdictions throughout the country based on the same or substantially the same publication. Judge CLARK calls particular attention to the opinions in *Sweeney* v. *Newspaper Printing Corp.*, 177 Tenn. 197 (per GREEN, *C. J.*); *Sweeney* v. *Capital News Pub. Co.*, 37 F. Supp. 355 (D. C. Ida.), and *Sweeney* v. *The Beacon Journal Pub. Co.*, 66 Ohio App. 475, *app. dism.*, 138 Ohio St. 330. (Since the present decision, Judge ALLRED, in the United States District Court in Texas, has dismissed a complaint, filing a comprehensive opinion which takes sharp issue with the reasoning of the majority herein. *Sweeney* v. *Caller-Times Pub. Co.*, ... F. Supp. ....., S. D., C. A. No. 62, Aug. 21, 1941.)

3. The "new law at least for New York State" created by the majority decision is "definitely disturbing law" (R. 38). The considerations which render it disturbing are the following (R. 38-39):

> "• • • It would be a fine world to live in if only tolerance were so usual that a charge of the lack thereof against a public official could be so presumptively

untrue that it would seem on its face unfair and libelous. But in our present world we must not take the naive view that what ought to be is, and that whoever suggests the contrary is a slanderer; for if we do so, we shut off all healthy criticism of prejudice, and allow bigotry full scope to act with impunity. Even more dangerous is the rationale of the decision that a comment leading an appreciable number of readers to hate or hold in contempt the public official commented on is libelous *per se*. Its broad sweep would take in comments found day after day in the most conservative newspapers, either in direct statement or as quotations of responsible critics, that a public official, particularly a legislator, is pro- or anti-labor, or pro- or anti-Nazi, or pro or anti this or that race, color, or creed. Minority comment on labor, religious and political views and activities of politicians becomes therefore hazardous. And the making of fine distinctions in rationale is indicated by the implication that a comment suggesting plaintiff's objection to the judicial candidate for his foreign birth alone would have been proper. Of course, the uncertain threat of suit, invited by a rule at once so vague and so extensive, is a restriction on freedom of the press almost as direct as a rule of clear liability.

"I do not think it an adequate answer to such a threat against public comment, which seems to me necessary if democratic processes are to function, to say that it applies only to false statements. For this is comment and inference, as the *Tanzer* case suggests, and hence not a matter of explicit proof or disproof. The public official will always regard himself as not bigoted, and will so testify, sincerely enough. And then the burden of proving the truth of the defense will rest upon the commentator, who must sustain the burden of showing his inference true. If he fails in even a minority of the suits against him—as the sporting element in trials to juries susceptible to varying shades of local opinion would make probable—he is taught his lesson, and a serious brake upon free discussion established. But the common-law requirement of proof of special damages gives him the

protection he needs, while at the same time it does prevent him from causing really serious injury and loss by false and unfair statements. That should be the rule applied here, as the district court held."

Specification of Error

The Circuit Court of Appeals erred in reversing the judgment of the District Court and in failing to affirm the same.

Questions Presented

1. In holding the publication complained of to be libelous *per se*, did the Circuit Court of Appeals go counter to applicable New York authorities establishing a special libel rule in the field of public officials? Assuming without conceding that applicable New York law is not altogether clear on the point, did the Circuit Court of Appeals, in creating "new law," go counter to declared policy of the State?

2. Did the Circuit Court of Appeals follow or did it violate the rules for ascertaining State law pronounced by this Court since its decision in *Erie Railroad Co.* v. *Tompkins*? In this connection, was the majority right in wholly ignoring the pertinent decisions of State courts of intermediate appeal as well as the declared policy of the State?

3. Is the judge-made rule of law established by the judgment under review compatible with the State and Federal constitutional guaranties of a free press and due process of law?

Statute and Constitutional Provisions Involved

The Rules of Decision Act (Judiciary Act of 1789, c. 20, § 34, 28 U. S. C., § 725) provides:

"The laws of the several States, except where the Constitution, treaties, or statutes of the United States

otherwise require or provide, shall be regarded as rules of decision in trials at common law, in the courts of the United States, in cases where they apply."

The Constitution of the State of New York, Article I, Section 8, guarantees a free press, and Article I, Section 6 thereof contains a "due process" clause. In addition, the First, Fifth and Fourteenth Amendments to the Constitution of the United States are deemed pertinent.

Reasons Relied on for Allowance of the Writ

I. The Circuit Court of Appeals has decided an important question of New York law in conflict with applicable local decisions.

1. Question of Local Law Involved

The Circuit Court of Appeals construed the statement that Congressman Sweeney opposed the nomination of Freed as Ohio District Judge on the ground that Freed was "a Jew, and one not born in the United States," as tantamount to a charge that the Congressman was prejudiced against Jews or at least foreign-born Jews.

This construction is open to very considerable doubt, as the District Court (R. 20, 27-8) and several other courts passing on substantially the same publication have pointed out. See opinions *supra*, p. 7. The fact that a man opposes the appointment of a particular person to a public office on the ground that the candidate is a member of a given racial or religious group does not at all indicate that he is prejudiced against that group: among other things, he may believe that it is wise, in making political appointments, to consider and give weight to the groupings, racial and religious as well as economic and geographical, in the community. We venture to say that there are few people who have not given consideration to such factors in the matter of political appointments, with-

out thereby exhibiting bigotry or prejudice, or at least more than the touch of prejudice that is ineradicable from even the best of human minds. The notion that merit alone should dictate political appointments and that anyone who thinks otherwise on any particular occasion is a bigot, is, indeed, neatly contradicted by a review of the qualifications which Congress has itself established by statute through the years for the holding of various Federal offices. See the collation of instances in the dissenting opinion of Mr. Justice BRANDEIS in *Myers* v. *United States*, 272 U. S. 52, 240.

Although the court's interpretation of the article is, therefore, more than questionable, we are nevertheless assuming that it was correct. The issue of law was, accordingly, whether the gravest sanction of the libel law—liability without proof of special damage—should attach to a writing concerning a public official, in respect to a matter of public interest, which, while not imputing to him incompetence or impropriety in office, incorrectly asserts that he entertains an opinion * which is deemed a bigoted or prejudiced opinion by an appreciable number of respectable members of the public. That question was answered in the affirmative by a majority of the court, and with no expressed limitation on the broad sweep of the doctrine enunciated.

The scope and importance of the decision will be considered more fully below; here we need only say with Judge CLARK that the rationale of the decision "would take in comments found day after day in the most conservative newspapers, either in direct statement or as

* For purposes of the applicable New York law hereinafter discussed, we need not mark a distinction between "act" and "opinion." Correct appraisal of the case will be assisted, however, by noting that there was nothing improper in merely opposing Freed for District Judge and there would be nothing libelous in the charge that the Congressman had done so; the sting of the alleged libel, if any, resided in the implication that he had done so because he held a certain bigoted opinion.

quotations of responsible critics, that a public official, particularly a legislator, is pro- or anti-labor or pro- or anti-Nazi or pro or anti this or that race, color, or creed. Minority comment on labor, religious and political views and activities of politicians becomes therefore hazardous" (R. 38). *

2. Majority's Superficial Analysis of New York Law

The majority of the court rested its decision on three New York cases. Two of these—the *Kimmerle* (262 N. Y. 99) and *Sydney* (242 N. Y. 208) cases—contain a general directional "definition" of the entire concept of libel *per se* in terms of tendency to expose the plaintiff to "ridicule and contempt." The majority makes no effort to analyze the *facts* of these cases, which are actually as far removed from the facts of the present case as can be imagined. † Nor is there a suggestion that the "definition" has in the process of judicial decision yielded to more specific and different formulations in terms of the identity of the plaintiff and the occasion and type of utterance involved.

It is plain that the "definition," which is the barest directional indication of the content of a great, diversified

* In *Sweeney* v. *Caller-Times Pub. Co.*, decided by Judge Allred on August 21, 1941, the publication sued on contained two paragraphs which were cut out of the "Merry-Go-Round" column as it appeared in petitioner's newspaper. These paragraphs stated that there were other persons on the Bar Association's preferred list; one had eliminated himself for physical reasons; two were eliminated by Justice Department officials "because of big business or reactionary connections"; one was eliminated because he was "a Catholic and the last two judicial appointments in Ohio have been Catholics." So the Department turned to Freed. Was this a libel on officials of the Justice Department? Or on the persons accused of reactionary connections? It would seem so, under the decision herein.

† The *Kimmerle* case involved slurs cast upon the proprietor of a rooming house who had allegedly become friendly with a self-confessed wife-murderer; held, no libel. The *Sydney* case concerned imputations on the chastity of a married woman referred to by the defendant as Fatty Arbuckle's latest lady love.

branch of the law of torts, affords scant if any guide to the decision of a particular case. This is indeed recognized in the *Kimmerle* opinion (at p. 102). Many statements in fact exposing persons to ridicule and contempt are not actionable *per se*, and *e contra*, many statements not in fact exposing persons to ridicule and contempt are nevertheless actionable *per se*. See *Rose* v. *Daily Mirror, Inc.*, 284 N. Y. 335; *Lamberti* v. *Sun Printing Assn.*, 111 App. Div. 437; *Cohen* v. *New York Times Co.*, 153 App. Div. 242; *Sunderlin* v. *Bradstreet*, 46 N. Y. 188; *cf.* L. HAND, *C. J.*, in *Burton* v. *Crowell Pub. Co.*, 82 F. (2d) 154 (C. C. A. 2). The "definition" takes on real meaning only when the holdings of the cases are analyzed and classified.

So analyzed and classified, the cases yield a special rule respecting *comment on public officials* which flatly covers the present situation. The majority ignores this rule: it refers to but one case involving a public official, the *Bennet* case (230 N. Y. 125), and even so fails to mention its facts and misstates the language of the Court of Appeals.

We urge that the superficial examination of New York law disclosed in the majority opinion, ignoring the public official rule, has resulted in a decision "not in accordance with the law of New York."

3. PUBLIC OFFICIAL RULE IN NEW YORK

Judge CLARK correctly says that in New York

> "the right of comment on a public official has been safeguarded in a practical way by 'a somewhat different rule' than in ordinary cases and 'a clear charge of corruption or gross incompetence holding one up to disgrace and contumely' is required"

before a statement concerning a public official will be held libelous *per se* (R. 37).

In support of this formulation of the public official rule Judge CLARK discusses and cites the cases of *Bennet*, *Tanzer* (240 App. Div. 203), *Gardner* (237 App. Div. 200) and *Hills* (122 Misc. 212, *aff'd*, 214 App. Div. 752), which are also cited and discussed in the opinion of the District Court. The effect of these decisions is given in the *Tanzer* case, *supra* (p. 205):

> "One who holds public office must expect criticism. It may be captious, ill-timed and without foundation in fact, but, outside of a clear charge of corruption or gross incompetence holding one up to disgrace and contumely, there is no libel."

As noted in the minority opinion, the same view obtains in other jurisdictions in which respondent has commenced suit (R. 38).

Restated, the rule is that, while it is a condition precedent to presumptive liability for statements concerning public officials that they shall have the *effect* of injuring reputation through exposure to odium in the minds of readers, that alone is not sufficient; this effect must have *come about through a particular kind of imputation*, namely, an imputation of corruption or gross incompetence; else there is no libel *per se*. By reference to this rule the publication at bar is clearly not libelous *per se*. The majority does not claim the opposite; it simply ignores the existence of the rule.

The public official rule derives from the declared policy of the courts of New York that the area of permissible expression should be much broader in the case of public officials than in the case of private citizens. Declarations to that effect are uniform and multitudinous. See *Hoeppner* v. *Dunkirk Printing Co.*, 227 App. Div. 130, 133-4, *aff'd*, 254 N. Y. 95; *Cortright* v. *Anderson*, 208 App. Div. 1, 4; *Howarth* v. *Barlow*, 113 App. Div. 510, 513. This policy is based on the supposition that the interest of the public official in his personal comfort is not absolute and must

on occasion yield to the larger interest in free, even if intemperate, discussion of official behavior and opinion; that persons who are thin-skinned usually have the choice of avoiding abuse by declining to enter the public arena through accepting public office; and that officials, protected as they are by certain extraordinary immunities from liability for their own utterances,* and usually enjoying readier access to the press than other people, have effective weapons of self-defense against false attacks other than resort to lawsuits. These things argue for a limitation as to public officials of the area of libel *per se;* but New York accords the same remedy to public officials as to private citizens in cases where actual injury can be shown, in the form of an action for special damages.

4. Cases Involving "a Clear Charge of Corruption or Gross Incompetence"

The majority refers to the *Bennett* case as holding that "when made of a public official, false accusations which may well lead right-thinking people to believe him unworthy of public trust and confidence are libelous *per se*" (R. 36). If such were the test, virtually every statement made in the course of a political campaign or in partisan editorial comment would be libelous *per se,* since it is always the purpose of one side to show that the other is "unworthy of public trust and confidence." Actually the Court of Appeals, in the part of its opinion which the majority was seemingly restating, used the words "unworthy of public trust *and* a *betrayer* of civic confidence" (p. 132); and in another portion of the opinion the court said that the plaintiff was charged with "serving the financial interests of a former client by the *betrayal* of his public duties" (p. 130).

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* Respondent, with absolute immunity for utterances on the floor of Congress, has made speeches in Congress about the present litigation. 87 Cong. Rec., p. A4039 (Aug. 6, 1941); 84 *id.*, p. 8694 (May 25, 1939). These speeches could be franked into New York without accountability for libel. N. Y. C. P. A., § 337.

The present case does not involve a charge of "betrayal," nor did the majority of the court below say that it did. But in any event the language of the Court of Appeals must be read in the light of the facts. Bennet, an attorney and a member of Congress, was accused of acting as a cheat by slipping a "joker" into a bill, against the public interest and in order to create huge unwarranted profits for his client. Thus Bennet was accused of an underhanded act involving corruption in office. Judge CLARK correctly states that the *Bennet* case involved a charge of "definite impropriety in office" (R. 37), and the case is within the ambit of the special rule upon which he relies.

And similarly we find that the other cases in New York holding statements critical of public officials to be libelous *per se* involved charges of gross incompetence or accusations of corrupt conduct—impropriety in office.

Hamilton v. *Eno*, 81 N. Y. 116: Plaintiff was accused of having made certain recommendations as to pavement out of a motive of personal profit.

Bingham v. *Gaynor*, 203 N. Y. 27: Plaintiff was accused of corruption, incompetence, scoundrelism, and lawlessness.

Powers v. *Dubois*, 17 Wend. (N. Y.) 63: Plaintiff was accused of being out to defeat a great public improvement "with a view to his own particular advantage, to the serious injury of the public interests."

Weed v. *Foster*, 11 Barb. (N. Y.) 203: Plaintiff was charged with accepting $5,000 for procuring the Governor to make an appointment.

Hoey v. *New York Times Co.*, 138 App. Div. 149: Held, that the jury should have decided whether the publication charged that plaintiff, in voting a certain way on a bill, "was corruptly and improp-

erly influenced by a desire to aid and assist the league, to which reference is made, and which, if it exists, must have been founded upon bribery and corruption."

Lunn v. *Littauer,* 187 App. Div. 808: Plaintiff was accused during the World War of "being the agent of selfish and designing business men, seeking to gain 'big money' through his supposed influence in procuring shipping for their own products in disregard of the rights of the nation."

Burnham v. *Hornaday,* 130 Misc. 207, *aff'd and mod.,* 223 App. Div. 218: Plaintiff's official acts were said to be swayed and determined by the profits which he obtained in private employment.

5. Cases Involving Less Than "a Clear Charge of Corruption or Gross Incompetence"

On the other hand, as Judge Clark says, New York cases "hold not libelous *per se* comments on public officers more directly suggesting corrupt motives than does the one here—which charges rather bigotry and prejudice than corruption or impropriety in office" (R. 37).

Duffy v. *New York Evening Post Co.,* 109 App. Div. 471: Plaintiff, a Republican of standing, was said to be "Absolutely devoid of any knowledge of the customs of polite men. Does well in business, especially during Tammany regimes. Devotes his time and energy more to assisting the Tammany leaders than to working for his own nominal party. Is reported to be about to join Tammany openly soon. Apparently knows no more of and cares no more for political principles than he does of the silurian age in geology. Mixes in Tammany factional fights, to the detriment of the Republican Party. A most unworthy choice."

Tanzer v. *Crowley Pub. Corp., supra*: Plaintiff was charged with appointing a city attorney to protect a client of the attorney who had filed hand-picked assessment rolls.

Hills v. *Press Co., supra*: Plaintiff was accused of favoritism and unfairness and inactivity in office.

Gardner v. *Home Life Pub., Inc., supra*: Plaintiff was accused of having announced the city's finances were sound the day before a huge deficit was announced.

It may be added that in the class of cases just cited, the publications were principally critical of the *acts* of public officials. In the case at bar the larger if not the whole emphasis of respondent's case is on the imputation of unpopular *belief or attitude.* Although unnecessary to the decision herein, the proposition is accepted in New York that imputation of belief or attitude is not actionable *per se,* even when made of a private citizen. *Cf. Flanagan* v. *McDermott Dairy Co.,* 132 App. Div. 166; *Cook* v. *Mirsky,* 252 App. Div. 496, *aff'd,* 278 N. Y. 524. And this is the rule probably prevailing generally. See *Rutherford* v. *Dougherty,* 91 F. (2d) 707 (C. C. A. 3) ("we cannot say that to state the plaintiff's address foments religious hatred and bigotry is libelous"); *Sullivan* v. *Meyer,* 91 F. (2d) 301 (C. A. D. C.) (a strong criticism of plaintiff's stand concerning the teaching of radical doctrine in public schools, held not libelous *per se*); *Snavely* v. *Booth,* 36 Del. 378 ("We have been referred to no authority, nor have we been able, in an extended search, to find authority, holding that criticism of mere opinion or theory is actionable defamation.").

6. "New Law" Established by Majority

Apart from definite conflict with New York authority, it is certainly clear that the decision below establishes

"new law" (R. 38) which is contradicted by actual practice. In the petition for rehearing a random collection of statements was culled from the issues of newspapers and magazines (R. 55-57), each one of which would be libelous *per se* under the rule announced below. We suggest that no issue of any newspaper, even the most dignified and cautious, is free of such statements: officials are constantly charged with entertaining unpopular views—that is one of the most familiar techniques of public debate. If the rule is as announced below, an enormous area of expression on matters of general concern is suddenly overhung with the threat of presumptive liability.

The law declared by the court below is new law, repugnant to the *mores* of the times as evidenced on every hand. Whether the Circuit Court of Appeals was right in creating it out of the vague implications of a general "definition" raises a question of such importance to democratic processes that, we submit, review by this Court is warranted even apart from that direct conflict with the holdings of New York cases which has already been demonstrated.

II. The Circuit Court of Appeals has failed to apply the Rules of Decision Act in accordance with the principles established by this Court or in consonance with its underlying policy.

Not only in objective result, but also in method and approach, the majority of the Circuit Court of Appeals has failed to comply with the Rules of Decision Act as that Act has recently been construed by this Court. In reality the intent and purpose of the Act have been violated, with the result that the "accident of diversity of citizenship" will, if the decision below is allowed to stand uncorrected, "disturb equal administration of justice in co-ordinate state and federal courts sitting side by side." *Klaxon Co.* v. *Stentor Mfg. Co.*, 313 U. S. ....., ..., 85 L. Ed. 969, 971.

1. The majority purports to follow authority in the New York Court of Appeals, but as we have seen, it merely rehearses a form of words contained in those cases which affords scant if any realistic guide to decision. The true effect of the holdings of the cases in the Court of Appeals as well as in courts of intermediate appeal has been disregarded.

Reliance upon general language in State cases, without adequate appraisal of the true effect of the holdings, obviously may be, and in the present instance clearly is, tantamount to a refusal or failure to follow State law in the sense required by the Rules of Decision Act. Compare the technique employed by this Court in finding State law in *Texarkana* v. *Arkansas L. Gas Co.*, 306 U. S. 188. The present case affords opportunity for admonition to Federal courts that compliance with the Act involves more than a protestation that State law is being applied, concealing under a gloss of words the substitution of the judgment of the Federal courts for the judgment of the State courts.

2. It might possibly be claimed—although erroneously, as we contend—that the highest State court has not directly passed upon the point in issue. The majority of the Circuit Court of Appeals has certainly suggested no *firmer* foundation for its ruling than this: for, while citing three cases in the New York Court of Appeals, it frankly admits of a doubt whether the publication at bar should be held libelous *per se* (R. 36).

Under such circumstances the majority was obliged to look for guidance to pertinent decisions of the Appellate Divisions, the courts of intermediate appeal. It failed to do so.

We recognize, of course, that the majority may have deliberated upon the cases in the Appellate Divisions although it omitted to cite or discuss a single one of them. Our argument is not addressed to the mere failure to cite

cases. We say that decisions of the Appellate Divisions which the majority ignores in its opinion are either conclusive authority in petitioner's favor (as the District Court and the dissenting Judge appear to have believed, see R. 23-25, 37) or are at least so far relevant and persuasive that the majority's omission to consider them in its opinion proves that it has done less than its full duty in finding and applying local law.

This Court has recently stressed the importance, if not the constitutional necessity (*cf.* BRANDEIS, *J.* in *Erie Railroad Co.* v. *Tompkins. supra,* pp. 78-80), of applying the pertinent decisions of State courts of intermediate appeal where the highest court of the State has not spoken or has spoken with an ambiguous or inconclusive voice. We need not do more than recall to the Court its holdings in *West* v. *American Tel. & Tel. Co.,* 311 U. S. 223; *Stoner* v. *New York Life Ins. Co.,* 311 U. S. 464; *Six Companies* v. *Joint Highway District,* 311 U. S. 180; *Fidelity Union T. Co.* v. *Field,* 311 U. S. 169; see *Russell* v. *Todd,* 309 U. S. 280, 293.

3. Even if the judgment under review is not in definite conflict with the decisions of the New York Court of Appeals or of State intermediate courts, it certainly establishes a new class of statements libelous *per se* which were not so until the Circuit Court of Appeals handed down its present decision (R. 38; see *supra,* pp. 18-19).

We do not assert that the Federal courts are bound under the Rules of Decision Act to conceive of the local law as a static and fixed corpus, so that, in the absence of a local decision holding that there *is* legal liability under given circumstances the Federal courts are peremptorily obliged to hold that *no* cause of action exists. We readily concede that "finding" local law is a task necessarily involving some elements of creation as well as discovery. But it has been made perfectly clear in recent declarations by this Court that the local law is in any event to be found

solely in the body of precedent, statute and policy upon which the State courts would base their own inferences in deciding the same question. See *West* v. *American Tel. & Tel. Co., supra.* To this extent the Federal courts are limited in creating "new law" or in expanding the contours of existing categories of law. *Moore* v. *Ill. Central Rd. Co.*, 312 U. S. 630, 634.

The majority, after stating that "opinions or prejudices concerning the matter in hand might well lead to different conclusions," proceeds to develop its own opinions and prejudices to the exclusion of opinions and prejudices deducible from New York precedent, statute and policy. Here are some of the data in New York which the majority ignored:

(a) The majority failed to advert to innumerable opinions of the State courts affirming the policy to allow wide latitude in criticism of public officials and in the expression of opinion on matters of public interest (see *supra*, pp. 14-15). Not only did the majority fail to observe this policy; judging from the context in which Judge CHASE cites the *Bennet* case, it would seem that the majority erroneously believed the local policy was to the contrary.

(b) The majority failed to consider whether the State policy favors the extension or restriction of the area of libel. In fact the State policy is to limit and restrict that field, concomitantly expanding the field of speech which is truly free. Thus Mr. Justice McCOOK in *Schwimmer* v. *Fox*, 150 Misc. 562, 565, *aff'd*, 242 App. Div. 625 (1934), noted that "The Court of Appeals in its recent cases dealing with libel has shown a tendency towards limitation." The tendency is fully operative today, as shown by *Rose* v. *Daily Mirror, Inc.*, 284 N. Y. 335 (1940). The court was there faced with the question whether it would create a "far-reaching extension of the law of libel as it has been generally understood in this State for many years"; and

that in a case making a very considerable theoretical and emotional appeal.* The court declined to do so. The same disposition toward limiting rather than multiplying actions "for words" is disclosed in *Wolfson* v. *Syracuse Newspapers, Inc.*, 279 N. Y. 716 (1939), and other cases.

The Legislature of the State of New York has exhibited a similar policy toward reducing and limiting such actions. Suggestive of this policy is, *e. g.*, the recent amendment of the Civil Practice Act cutting down the time for commencement of libel actions to one year, the smallest period of limitations appearing in the Act (§ 51); and the reversal of the age-old rule of *qualified* privilege in publishing fair reports of legislative, judicial or other public and official proceedings into a rule of *absolute and unqualified* privilege (*id.*, § 337).

(c) As we show at greater length below, the majority of the Circuit Court of Appeals, although seasonably and properly urged (R. 42-44), failed to take account of the limiting effect of constitutional guaranties embodied in the Constitution of the State of New York (and contained as well, although in different terms, in the Federal Constitution),—provisions which, if not altogether conclusive in petitioner's favor, as we contend, at least afforded reason for decision in petitioner's favor if the question was otherwise open to doubt.

On all the grounds just mentioned, we submit that the Rules of Decision Act and its animating policy have been flouted in the decision below, and under circumstances calling for correction by this Court.

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* The question was whether a cause of action should be granted a person falsely charged with being a close relative of a deceased murderer. There is authority in other States rendering such statements actionable, and it is clear that they do in fact expose the plaintiffs to "ridicule and contempt."

III. The Circuit Court of Appeals has created "new law" repugnant to the Constitutions of the State of New York and the United States.

By the decision under review the Circuit Court of Appeals has established new law to the effect that words accusing a public official of entertaining a belief in a matter of public interest which is condemned by an appreciable number of respectable people, are presumptively actionable. This new law is announced without limitation and covers the imputation of any belief, provided only it strikes the court as one which a segment of the public might regard with distaste.

While the court has not excluded the defense of truth, it is plain that the nature of the prohibited imputations is such that they would not be capable of strict legal proof in at least many instances; and that in very many if not in all cases proof of truth under common-law rules of evidence would be difficult in the extreme. For these are questions of inference from likes and dislikes, inclinations and disinclinations, affections and disaffections—a shadowland in which no one can assay the real truth but the plaintiff, and sometimes not even he. But, if the defendant cannot prove his statement by legal proof to the satisfaction of both the court and a jury, the public official becomes peremptorily entitled to damages even if he has suffered no actual injury; and damages in such punitive amount as a jury may see fit to assess.

Obviously, then, the new law announced by the court is an overhanging threat of vast dimensions, made all the more serious by reason of its essential vagueness, against the expression of ideas on matters of public concern. By the same token, and to the same extent, public officials are immunized against effective criticism.

We do not doubt that such a rule, if embodied in a statute, would be unconstitutional.

1. The guaranty of a free press involves more than a prohibition of "previous restraints"; a statute imposing

subsequent punishment unduly trammeling or embarrassing expression on matters of public interest is likewise unconstitutional. *Thornhill* v. *Alabama,* 310 U. S. 88; *Cantwell* v. *Connecticut,* 310 U. S. 296, 307.

2. It makes no constitutional difference that the penalty is imposed through processes denominated civil rather than criminal. *Cf. Near* v. *Minnesota,* 283 U. S. 697. In respect to the seriousness of the threat, the restrictive effect on communication of ideas, and the penalty in prospect or actually imposed, a suit for damages is not less and may well be more invidious than a prosecution for a fine.* (Congressman Sweeney asks damages of $250,000 in the present case, R. 5, and he instituted seventy-four other actions.)

3. A limitation on free speech is to be tested for constitutional purposes not only in the light of its impact on the particular state of facts *sub judice,* but in the light of the generality of cases that may arise under it. Proof of an abuse of power in the particular case is not a requisite for attack on the constitutionality of the rule, whether of previous restraint or subsequent punishment. *Thornhill* v. *Alabama, supra,* pp. 97-98; *Hague* v. *C. I. O.,* 307 U. S. 496, 516. Thus we have to consider the enormous area of expression which becomes at least "hazardous" (R. 38) under the new rule of liability.

4. The essential vagueness of the rule adds immeasurably to the hazard and is a further index of invalidity. *Cantwell* v. *Connecticut, supra,* p. 308. †

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* *Cf.* Holmes, COLLECTED LEGAL PAPERS, pp. 173-4.

† As Judge CLARK said, "And the making of fine distinctions in rationale is indicated by the implication that a comment suggesting plaintiff's objection to the judicial candidate for his foreign birth alone would have been proper. Of course, the uncertain threat of suit, invited by a rule at once so vague and so extensive, is a restriction on freedom of the press almost as direct as a rule of clear liability" (R. 38-39).

It is not enough to say that, as libels are traditionally punishable despite the free speech guaranty, a holding that a class of statements is libelous can raise no constitutional question. For it is obvious that whatever is added to the realm of libel is practically withdrawn from the realm of free speech, and that a point may undoubtedly be reached where expansion of the range of libel must be held unduly to restrict the permissible range of free speech. We think that point has been reached in the present case, through the enunciation of a new and sweeping rule of presumptive liability for words.

Unless the nexus between libel and free speech is as we have described it, the recent decisions of this Court protecting the right of utterance may be rendered meaningless by manipulation of the law of libel. For example, of what avail are the decisions of this Court safeguarding picketing as a constitutional right,* if a legend on a picket sign "Do Your Part! Buy Where You Can Work! No Negroes Employed Here!"† may be held libelous *per se* as an imputation to the employer of anti-Negro prejudice, as under the decision at bar it might well be?‡ This Court would certainly not tolerate any such absurd result. See *United States* v. *Hutcheson,* 312 U. S. 219, 236.

In sum, without here attempting to argue the matter fully, we believe that the decision below, if enacted as a statute of the State or the Nation, would be invalid within recent pronouncements of this Court; or at least that a question of constitutionality worthy of review by this Court would be presented.

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* *Senn* v. *Tile Layers Prot. Union,* 301 U. S. 468, 478; *Thornhill* v. *Alabama, supra; American Fed. of Labor* v. *Swing,* 312 U. S. 321.

† As in *New Negro Alliance* v. *Sanitary Grocery Co.,* 303 U. S. 552, 557.

‡ In *American Fed. of Labor* v. *Swing, supra,* the State court had granted its injunction, vacated by this Court, in part on the ground that the picketing had included the dissemination of libelous statements about the employer.

But the constitutional question becomes all the more significant because the new rule was announced by a Federal court purporting to apply the State common law.

It is now settled that a judge-made rule of substance may be unconstitutional in the same measure as a statute; this has been evolved in the very realm of free speech. *American Fed. of Labor* v. *Swing*, 312 U. S. 321. And it has been forcefully pointed out that a judge-made rule may involve greater hazards to the constitutional guaranty than a statutory rule, because necessarily defined with less precision. ROBERTS, *J.*, in *Cantwell* v. *Connecticut, supra*, p. 308. Add to this that the rule, claimed to be in derogation of a right guaranteed by the *State* Constitution, is here being established by a *Federal* court less responsive to the will of the people of the State than judges of the local courts.*

In such an instance we submit this Court has a special duty of review and supervision.

IV. The questions presented go to the essence of the democratic process and warrant review by this Court.

Since the decision in the *Tompkins* case, this Court has repeatedly declared that asserted conflict of the decision of a Federal court with applicable local law inherently raises a significant question concerning the inter-relations of the judicial systems of the States and the Nation. *Wichita Royalty Co.* v. *City Nat. Bank*, 306 U. S. 103, 107; *West* v. *American Tel. & Tel. Co.*, 311 U. S. 223, 237. This Court has many times corrected such conflicts, recognizing that correction may not safely be left to the accidents of subsequent litigation in State courts. In addition, this

* The rule of liability declared below would violate the "free speech" and "due process" provisions of the State Constitution, and the "due process" clause of the Fourteenth Amendment to the Federal Constitution, if pronounced by a State court. The fact that the case arises in a Federal court may bring into operation also the First and Fifth Amendments to the Federal Constitution.

Court cannot ignore the fact that the authority of the Circuit Court of Appeals even in a matter of local law invests its decisions with great power as precedent in courts throughout the country.

But if the Court was for such reasons prompted to grant review where the asserted conflict involved a question of the validity of a utility franchise (*Texarkana* v. *Arkansas L. Gas. Co.*, 306 U. S. 188), or the burden of proof in a land action (*Cities Service O. Co.* v. *Dunlap*, 308 U. S. 208), it should, we submit, not hesitate to grant review where the asserted conflict is on a point vital to the democratic process itself.

What the present decision means is that comment on matters of public interest and particularly on public officials has now—of all times in American history!—become a dangerous thing. It is a rule of *"caveat commentator."* To impute to an official an unpopular opinion or belief —unpopular in any given community—exposes the commentator to the "sporting element" of jury trials and punitive liability. Americans have not reached the beatific state where argument can proceed without invective, and words have potentiality for fast travel and wide dissemination. What belief on any acute political or social problem is not today viewed with distaste in some communities in the United States? Shall such words as "appeaser," "warmonger," "pacifist," "Nazi sympathizer," "fellow traveler," "Red," "Bolshevik," "Negro-hater," "Negro-lover," "Jew-hater," "Jew-lover," "pro-union," "anti-union," "Papist," "anti-Papist," "Know Nothing," "anti-Know Nothing," "Fundamentalist," "anti-Fundamentalist," and the thousand other characterizations that fill our daily press in all sections of the country, be eliminated from the vocabulary of the polemicist or used only at the risk of reprisal in the courts—and that by public officials who themselves enjoy extraordinary immunities for their own often equally intemperate utterances and ready access to instruments of self-defense (including, in the pres-

ent case, the government-subsidized franking privilege)? The right to criticize our rulers distinguishes our way of life from that of the dictatorships; it is our major corrective and without it the democratic mode is impossible. Is not the new law announced below therefore perilous to the continuance of our pattern of government? These are the issues and the questions which are at the base of the decision below.

The decision is understandable as the instinctive reaction of men who hate religious bigotry with all their heart. Presumably they felt that their decision would assist minorities subjected to bigoted attack by putting words like "anti-Semitic" in the class of statements so horrendous as to be libelous *per se*. But reflection would have shown that the decision, far from assisting minorities, deals an especially hard blow at them. It is the law of New York, as of many other jurisdictions, that defamatory statements directed against groups rather than individuals are not actionable—this is a corollary of the declared State policy favoring uninhibited controversy on public issues. See *People* v. *Edmondson*, 168 Misc. 142, 154. Thus a venal public official may trot out the "Protocols of Zion" and declaim against Jews; or against Catholics, or other minorities; and he cannot be brought to book to prove his charges. But under the present decision the members of the group defamed cannot attack a demagogue by the name he deserves without exposure to such risk as will suffice to seal their lips in the first place. Without in any way impugning the respondent—for we are here considering the broader implications of the decision—we suggest that the rule announced below puts a siege gun in the hands of bigots which will be turned against minorities.

Conclusion

For the foregoing reasons your petitioner, by its solicitors, prays that a writ of certiorari issue to the Circuit Court of Appeals for the Second Circuit, to the end that the case may be reviewed and determined by this Court and the judgment of the Circuit Court of Appeals reversed.

Respectfully submitted,

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